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Supreme Court of the United States

No. 87

LOCAL No. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,
Petitioner,

versus

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER AND J. E. TAPPAN, d/b/a S. J. CURRY & COMPANY, a Partnership,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF RESPONDENT.

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On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

By virtue of the order granting certiorari issued from this Court on the 21st day of May, 1962, the questions to be considered by this Court are limited to the following and shall be considered by the Respondent in the order named:

(1) Was the decision of the Supreme Court of the State of Georgia from which certiorari was granted by the Supreme Court of the United States a final judgment from which the Supreme Court of the United States could properly grant certiorari?

(2) In granting said injunction, said court deprived Petitioner in Certiorari of rights protected by the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated?

(3) In granting said injunction said court assumes jurisdiction of a cause, the subject matter of which had been pre-empted by enactment of the National Labor Relations Act, Title 29, Section 157-158 (b) of the United States Code Annotated?

(4) Did the Supreme Court of Georgia err in holding that it was illegal for the Petitioner to carry a placard in front of the construction job containing the statement: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of similar types of work in the Atlanta area. Construction & General Laborers' Union 438, AFL-CIO."? The Court so held, notwithstanding the fact that the Court found that the legend carried upon said sign was true and that S. J. Curry & Company was not paying the prevailing wage in the area even though it had executed a contract with the City of Atlanta for said construction which contract contained the provision: "Wages will conform with those being paid on similar types of work in the Atlanta area."

STATUTES INVOLVED.

In addition to the statutes set forth in Petitioner's brief as being pertinent to the issues raised, the following section of the United States Code Annotated, Title 29, Section 164 (b), 61 Stat. 136, Section 14(b), is also pertinent to an understanding of the questions raised.

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

STATEMENT OF THE CASE.

The statement of the case contained in Petitioner's brief is essentially correct although Petitioner had taken several liberties in drawing conclusions from portions of the record which it is felt are entirely unwarranted. Contrary to the statement of Petitioner that the trial judge found at the original interlocutory hearing that the Petitioner was engaging in picketing for purposes of publicizing the fact that the Defendant in Certiorari was not paying the prevailing wage in the Atlanta area in violation of its contract with the City of Atlanta, the Honorable Ralph H. Pharr, Judge of the Superior Court of Fulton County, made no such finding; but simply found from the pleadings, affidavits, oral testimony and argument of counsel that the re-

quested temporary interlocutory injunction should be denied. (Tr. 41.)

It is also contended by the Petitioner in its statement of the case that the decision of the Supreme Court of Georgia, which is reported in 217 Ga. 512 and 123 S. E. 2d 653, held that the language upon the picket signs was true and that the wages being paid were not those conformed with those wages being paid in the Atlanta area and that said failure to pay said wages constituted a breach of contract. It is important at the outset, in understanding the statement of the case, that this Court recognize that while the Supreme Court of Georgia held that the trial judge *was authorized* (Emphasis supplied) to find from the evidence that the Defendant in Certiorari was not paying wages conforming with those paid for similar type work in the Atlanta area, there was no holding by the Court that the contract in question between the Respondent and the City of Atlanta was in fact breached. Nor was there a holding by the Supreme Court of Georgia, as contended by Petitioner, that the information contained on the picket sign was true, but rather the Supreme Court of Georgia found that the Respondent was not paying a wage scale of certain specified construction contractors in the Atlanta area of similar type work. (Tr. 43.)

It is felt that these preliminary distinctions are important in any statement of the case for the Supreme Court of Georgia's decision did not turn on any question of breach of contract between the Respondent and the City of Atlanta nor did the Supreme Court of

Georgia concern itself with the veracity of the statements on the picket signs carried by Petitioner, but rather the Court's inquiry was directed towards the resulting and underlying purpose of Petitioner's conduct in its picketing of the sewage disposal facilities under construction by the Respondent.

SUMMARY OF ARGUMENT.

At the outset or threshhold of any consideration of the merits of this case, as limited by the specifications in the grant of certiorari, this Court of necessity must first decide whether or not the ruling of the Supreme Court of Georgia on an interlocutory injunction is subject to review. It is the contention of the Respondent that the certiorari was improvidently granted under the past decisions of this Court and that the case does not now stand ready for review by this Court as it has not reached that degree of finality required by this Court. The case presently stands on the trial docket of the Superior Court of Fulton County, Georgia subject to be called for final hearing consistent with the decree of the Supreme Court of Georgia, and it is submitted that because of the nature of an interlocutory order in the practice and procedure of Georgia courts the case still remains in the interim stage with many decisions on the final merits to be determined at the final hearing in the trial court.

The conduct of the Petitioner at the construction site of the Respondent in Atlanta, Georgia has admittedly resulted in job stoppage and loss of work and under

the uncontradicted evidence the picket line of the Petitioner was not established until after demand was made to use union labor exclusively on the job. Under these facts the conduct of the Petitioner was clearly violative of the right to work statutes of the State of Georgia and contrary to the public policy of that state and as such the courts of Georgia had jurisdiction of the matter and the conduct was not pre-empted or protected by any provisions of the National Labor Relations Act.

Under the uncontradicted evidence as reflected in the transcript, the conduct of the Petitioner was calculated to put the Respondent in a position of requiring union membership as a condition of employment or in the alternative to be unable to comply with its contract with the City of Atlanta. Under these facts, the Supreme Court of Georgia did not err in finding that the conduct was a violation of the statutes of that state notwithstanding any language on the picket sign carried by Petitioner, for irrespective of the statements contained on the placard or picket sign carried by the Petitioner, the Supreme Court of Georgia has found, and justifiably so, that Petitioner's conduct was a violation of the statutes of that state.

ARGUMENT.

The Writ of Certiorari was Improvidently Granted in the Instant Case.

In the words of Mr. Justice Minton, we are at the very threshold presented with a serious question of

jurisdiction. In granting certiorari in the instant case this Court requested counsel to brief and argue the question of the Court's jurisdiction to review the judgment of the Supreme Court of Georgia under 28 U. S. C. §1257. As stated in the Respondent's brief resisting the Writ of Certiorari, the Petitioner seeks to have this Court review a judgment of the Supreme Court of Georgia which reversed an interlocutory judgment or order of Fulton County Superior Court in the State of Georgia. The judgment of the Supreme Court of Georgia in reversing the trial court has in effect returned the case to the lower court for such further disposition as may be proper under the pleadings. The case now stands on the trial docket of Fulton Superior Court for final disposition and final trial. It is respectfully submitted that on these facts alone there is no final judgment in the case such as would give this Court jurisdiction to entertain the present review as contemplated under 28 U. S. C. §1257.

The issue is, basically, whether or not the judgment of the Georgia Supreme Court is such a final judgment or decree within the meaning of Section 1257 as to give this Court jurisdiction. This Court has previously ruled clearly and concisely that a case, such as the instant case, is not right for review by virtue of a Writ of Certiorari when the facts show that the state court's decree simply has the effect of returning the matter to the lower trial court for such further disposition as may be proper under the pleadings of that state. The issue thus presented is not a novel one to

the Court and as a matter of fact has been dealt with foursquarely in the case of *Montgomery Building and Construction Trade Council, et al., Petitioners vs. Ledbetter Erection Company, Inc.*, which is reported in 344 U. S. 178, 97 L. Ed. 204, 73 S. Ct. 196.

It would indeed be difficult to find a decision more squarely in point with the initial problem raised in the instant case than this decision; and Judge Minton, in speaking for a seven member majority of the Court, so clearly and strongly states the Court's position on such matters as to warrant a recitation of the main body of that decision.

Judge Minton pointed out on Page 180 of that decision:

> "From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case. In Gibbons v. Ogden (US) 6 Wheat 448, 5 L ed 302, the first case presenting this issue to this Court, an injunction had been granted by a Chancery Court of the State of New York. The defendant answered and moved to dissolve the injunction. The court denied the motion to dissolve, and the defendant appealed to the Court for the Trial of Impeachments and Correction of Errors which affirmed. The appeal to this Court was dismissed because there was no final decree in the court of last resort for this Court to review.
>
> The provision of §1257 that only 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be re-

viewed by the Supreme Court . . . .' has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat. 85 §25.

'This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.' Radio Station WOW v. Johnson, 326 US 120, 124, 89 L ed 2092, 2097, 65 S. Ct. 1475.

The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in Gibbons v. Ogden (US) supra. There is no room here for interpretation. The rule remains unchanged.

True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari. Baldwin Co. v. R. S. Howard Co., 256 US 35, 40, 65 L ed 816, 818, 41 S Ct 405.

It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocutory decree could have been readily converted into a final decree,

and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.

Since there was no final judgment of the Supreme Court of Alabama for review, the writ of certiorari must be dismissed as improvidently granted."

The reasoning of Justice Minton in the *Montgomery* case, *supra*, remains judicially sound and the requirement of finality announced in this decision derives added force and importance when, as in this instant case, the jurisdiction of the United States Supreme Court is invoked to upset a decision of the Supreme Court of Georgia.

Justice Frankfurter, in delivering the opinion of the Court in the case of *Radio Station WOW vs. Johnson*, 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475, in speaking on the question of finality of state courts' judgments, said at page 124 of that decision:

"This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in a very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force on the jurisdiction of this Court is invoked to upset the decision of the state court. Here we are in the realm of po-

tential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in state litigation only after 'the highest court of the State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' Section 237 of the Judicial Code, 28 U. S. C. A. §344(a), 8 F. C. A. Title 28, §344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

Notwithstanding any contention by the Petitioner to the contrary, the fact remains that the interlocutory order in the instant case is not a final order within the meaning of 28 U. S. C. §1257, and this Court is in effect being asked to review exactly the same type of order or judgment that it refused to review in not only the *Montgomery* case above, but also *American Federation of Labor vs. Swing*, 309 U. S. 659, 84 L. Ed. 1007, 60 S. Ct. 514; *Gibbons vs. Ogden*, (U. S.) 6 Wheat 448, 5 L. Ed. 302, and *Moses vs. Mobile*, (U. S.) 15 Wall 387, 21 L. Ed. 176.

It should perhaps also be mentioned in passing that there is no contention here that the Petitioner will suffer irreparable harm if this Court does not entertain this review at this time, (see *Clark vs. Willard*, 294 U.S. 211, 79 L.Ed. 865, 55 S.Ct. 365) nor has there been any contention that there is such a grave public issue involved as would warrant the intervention of this Court at this time. The facts in the instant case

lend themselves well to an application of the *Montgomery* decision. For notwithstanding the contentions of Petitioner in regard to the status of the interlocutory injunctions in the trial courts in Georgia, and especially in Fulton Superior Court, the hard fact remains that the present case, as it now stands on the trial docket, remains undisposed of and stands ready for trial when called by that Court for final hearing. Petitioner itself has had a Plea in Abatement pending in the trial court since the original pleadings were filed and has never called this Plea for hearing and disposition, although the Plea in Abatement attacks the jurisdiction of the Georgia court and raises the very questions that Petitioner would seek to have this Court answer. It is also important that this Court recognize that notwithstanding the judgment of the Supreme Court in reversing the trial court, and the fact that by remittitur the judgment of the Supreme Court of Georgia has been made the judgment of the lower court, no order or affirmative relief has ever been issued by the lower court actually restraining the conduct of the Petitioner.

This Court should also recognize that the question of whether or not there had been a sufficient involvement of interstate commerce so as to invoke federal jurisdiction or control has remained undecided in this case and has never been adjudicated by the courts of Georgia. That is, notwithstanding the stipulation between the parties that the Respondent purchased in excess of $50,000.00 worth of goods out of state to be delivered to the job in Atlanta, Georgia, there is no allegation in the original complaint that either the

Petitioner or Respondent were engaged in interstate commerce nor are there any additional facts in the record upon which this matter could judicially be decided. Rather, Petitioner has simply assumed that the stipulation concerning purchase of goods and commodities from out of state is sufficient to bring this entire matter within federal jurisdiction due to the involvement of interstate commerce. Actually, this question was irrelevant to the issues brought up at the original interlocutory hearing by the Respondent and the question of whether or not the state court has jurisdiction will properly be decided either upon the Petitioner's Plea in Abatement or in the final hearing of the matter.

At any rate, as the matter now stands, the instant case has not reached that degree of finality as would make it subject to review by this Court by the previous standards laid down not just by this Court but, most importantly, by the provisions of 28 U. S. C. §1257. As Justice Minton stated in the *Montgomery* decision, the enlargement of the jurisdiction of this Court in regard to finality of interlocutory decrees is a matter which is properly left to the Congress.

In recognition of the prior rulings of this Court and in an attempt to evade these decisions, the Petitioner has incorporated into its brief an affidavit which purports to demonstrate that over the past ten years not a single application for interlocutory injunction was ever processed to a final hearing in Fulton Su-

perior Court. However, even assuming that this Court could properly consider such *aliunde* evidence, and that the facts contained in the affidavits are true, the fact remains that the instant case still involves an interim matter or interlocutory decree and many facets of the principal case are yet to be decided in the trial court. Further, in the instant case, unlike the vast majority of cases cited by Petitioner in support of its position, the interlocutory decree was not granted by the trial court, and the Petitioner was left to continue the picketing at its leisure without obstruction. It was only after the Respondent prosecuted its appeal to the Supreme Court of Georgia that the Petitioner voluntarily removed the pickets concerned and the Respondent was able to return to a normal work situation. Once again, it must be borne in mind that notwithstanding the decree of the Supreme Court of Georgia in reversing the trial judge's refusal to grant the interlocutory order, no affirmative relief in the form of a restraining order was ever issued from the trial court.

As Justice Frankfurter said in *Radio Station WOW, Inc. vs. Johnson, supra*, the requirement of finality as set out in the provisions of Section 1257 is one that is supported by good judicial administration. For without this rule this Court would be called upon to decide questions of merit and substance in piecemeal fashion which later might become moot because of additional proceedings in the state court. Thus, it is respectfully submitted that this Court should not now intervene piecemeal in litigation which is not otherwise disposed

of in the State of Georgia. The jurisdiction of this Court has been invoked in an attempt to upset the decision of a state court; and there is indeed the possibility of a potential conflict between the courts of these two different governments. This is the very situation that Justice Frankfurter spoke out against in *Radio Station WOW vs. Johnson, supra*, and which was recognized by Justice Minton in the *Montgomery* case.

This Court was concerned with the question of finality of a state court decree in the case of *Republic Natural Gas Company vs. Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972. Justice Frankfurter, speaking for the majority again, said on Page 67 of that decision in regard to finality:

> "Ever since 1789, Congress has granted this Court the power of review in State litigation only after 'the highest court of a State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' §237 of the Judicial Code, 28 USCA §344, 8 FCA title 28 §344, rephrasing §25 of the Act of Sept. 24, 1789, 1 Stat. 73, 85, c. 20. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample

testimony that it is an important factor in securing harmonious State-federal relations."

Judicial precedent has long been that effective catalytic agent which down through the years has given any judiciary or judicial system a sound and stable foundation. We submit that the *Montgomery* case is sound and reflects a clear construction of Section 1257; and for this Court to grant certiorari in the instant case it must of necessity reverse the *Montgomery* case and the decisions upon which the *Montgomery* case was founded. An overruling of the *Montgomery* case will put this Court in a position of accepting piecemeal litigation and will effectively destroy the good judicial administration of which Justice Frankfurter spoke, and perhaps more importantly, a change of this Court's attitude towards review of interlocutory orders, as expressed in the *Montgomery* case, will destroy the congressional intent to restrict this Court's reviewing power as reflected in the statute since the Judiciary Act of 1789

The Supreme Court of Georgia did not Deprive the Petitioner in Certiorari of Rights Protected by the National Labor Relations Act, Title 29, Section 157-158(b) in Enforcing the Right to Work Laws of the State of Georgia; Nor Has it Assumed Jurisdiction Over a Matter Which Has Been Pre-Empted by These Sections.

The question of whether or not the Supreme Court of Georgia by its decision has in any way deprived Petitioner of rights guaranteed and protected under

the National Labor Relations Act as amended or has assumed jurisdiction of a matter which has been preempted by the federal government, requires some construction of the National Labor Relations Act and most particularly of those provisions which the Petitioner contends removes this case entirely from consideration by the state court. Title 29, §157 of the United States Code Annotated, reads as follows:

> "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and shall also have the right to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 158 (a) (3) of this title."

Section 158(a)(3) mentioned in the quoted section authorizes the execution of a union shop agreement pursuant to certain qualifications listed therein. Petitioner also deems Section 158(b) of Title 29, United States Code Annotated, pertinent to its appeal here insofar as this section relates to prohibited conduct on the part of a labor organization which would in any way restrict or coerce employees in the exercise of their right guaranteed in Section 157 or to cause an employer to discriminate against an employee because of his failure to either belong to a labor organization or to

tender periodic dues or initiation fees required as a condition of membership. All of these sections, however, must be considered in *peri materia* with Section 164(b) of the same Act which reads:

> "Nothing in this Act shall be construed as authorizing the execution of application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

It therefore seems that Congress has unequivocably expressed its intention to leave to state sovereignty, in the field of interstate labor relations, the power to either permit or prohibit contracts containing union security provisions requiring membership in a labor organization as a condition of employment. The congressional intent behind the enacting of Section 164(b) is clearly manifested in Conference Committee Report, House Report No. 510 dated June 3, 1947 (U. S. Code Congressional Service, 80th Congress, First Session 1947, Page 1166) where the following report appears:

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It

> was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect."

The underlying principle as expressed in the congressional report, was reiterated by Justice Frankfurter, who speaking for this Court in *Algoma Plywood and Veneer Company vs. Wmb*, 336 U. S. 301, 93 L. Ed 691, 69 S. Ct. 584, said

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, 14(b) was included to forestall the inference that federal policy was to be exclusive."

This Court, on numerous occasions, has recognized that a state possesses jurisdiction to enjoin picketing for an unlawful purpose, although peaceful in nature when such picketing is in contravention of the public

policy as declared in a particular state right to work law. *Local Union No. 10, United Association of Journeymen, Plumbers and Steamfitters of the United States and Canada of the AFL, et al. vs. O. G. Graham*, 345 U. S. 192, 97 L. Ed. 946, 73 S. Ct. 585; *Building Service Employees International Union vs. Gazzam*, 339 U. S. 532, 94 L. Ed. 1045, 70 S. Ct. 784; *International Brotherhood of Teamsters, C. & W. H. Union vs. Hanke*, 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773; *International Brotherhood of Teamsters Local 695, AFL vs. Vogt, Inc.*, 354 U. S. 284, 1 L. Ed. 2d 1347, 77 S. Ct. 1166.

In the *Graham* case, *supra*, labor unions picketed a construction project because some of the subcontractors employed non-union help, similar to the instant case. Although the picketing was essentially peaceful in nature, the Virginia courts enjoined it on the ground that it was carried on for the purpose of coercing the general contractor into forcing his subcontractors to employ only union labor on the job; and because of this finding the Virginia Supreme Court of Appeals found that the conduct of the labor unions was carried on for a purpose in conflict with the right to work statute of that state. Mr. Justice Burton, speaking for the majority of the Court, stated that the basic question involved was whether the Commonwealth of Virginia, consistently with the constitution of the United States, might enjoin peaceful picketing when it is carried on for a purpose in conflict with the Virginia right to work statute. It is interesting to note that this Court in finding that the Virginia court had the

authority to enjoin such peaceful picketing noted that from the record it was obvious that the Petitioner had engaged in something more than the mere publication of the fact that the particular job was not 100 per cent union. Rather this Court, speaking again through Justice Burton, said on page 200 of this decision

> "that picketing was done at such a place and in such a manner, that coupled with established union policies and traditions, it caused the union men to stop work and thus slowed the project to a general standstill. . . . . ."

And further at Page 201:

> "Based upon the finding of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The intermediate result of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all non-union men or all subcontractors employing non-union men on this project."

The foregoing statements of Justice Burton are closely related to the finding of fact that the Georgia Supreme Court made in regard to the conduct of the picketing in the instant case.

The *Vogt* case, *supra*, while dealing directly with the question of the state's power to enjoin picketing, notwithstanding rights granted under the Fourteenth Amendment, also was a recognition by this Court of the

right of the Wisconsin Supreme Court to enjoin picketing which was otherwise peaceful in nature when it contravened a state policy prohibiting a union from picketing to coerce an employer to put pressure upon his employees to join a union. Justice Frankfurter in speaking for the majority and in tracing the history of the conflict created by the Thornhill doctrine on the one hand, and the recognition on the other of states to enforce their public policy, stated on Page 291 of the decision:

> "The implied reassessments of the broad language of the Thornhill case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to *valid state policy in a domain open to state regulations.*" (Emphasis supplied.)

The learned Justice further stated on Page 294 of that decision in reference to the *Stacey* case (350 U. S. 870, 100 L. Ed. 770, 76 S. Ct. 117):

> "As in Stacey the highest state court *drew the inference from the facts* that the picketing was to coerce the employer to put pressure on his employees to join the union in violation of the declared policy of the State." (Emphasis supplied.)

The provisions of Section 164(b) of the Act coupled with the recognition by this Court of the state's right to enforce its right to work statutes against otherwise peaceful picketing seemed to lead to the inescapable conclusion that the Supreme Court of Georgia did not

deny to Petitioner in Certiorari any rights protected or guaranteed under the National Labor Relations Act.

It is the position of the Petitioner in Certiorari that irrespective of whether the conduct of its pickets was an expression of a right under Section 7 of the Act or was unlawful conduct under Section 8 of the Act, the fact remains that in either event such conduct has been pre-empted and the state court lacked jurisdiction in the matter. There can be no doubt that if the conduct of the Petitioner was either protected or prohibited under the Act, then in that event the Supreme Court of Georgia could have no jurisdiction. *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S. 270, 3 L. Ed. 2d 289, 79 S. Ct. 273. The Petitioner in Certiorari in support of its contention that the concerted activity of its members at the Respondent's construction site was either a protected activity under Section 7 or an unlawful activity under Section 8 and hence jurisdictionally protected by the Act and pre-empted so as to be out of control of the state courts, cites the cases of *Weber vs. Anheuser-Busch, Inc.*, 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480; *Building Trades Council vs. Garmon*, 359 U. S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773; *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, 2 L. Ed. 151, 78 S. Ct. 206; *Garner vs. Teamsters, C & H Local Union*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161; and *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S. 270, 3 L. Ed. 2d 289, 79 S. Ct. 273.

The distinction between the cases cited by the Petitioner and the *Graham* and *Vogt* cases and the instant

case is that in the latter instances the Supreme Court of Virginia, Wisconsin and Georgia have found from the record that the conduct of the union was unlawful in that it was calculated to cause a situation which was repugnant to the right to work statutes of the respective states. It is respectfully submitted that there is nothing in the record of the instant case which would in any way justify a finding that the conduct of the Petitioner was either protected or prohibited under the Act. Although the Petitioner contends and stated in its brief that the purpose of its picketing was to publicize certain facts surrounding the Respondent's job, the Supreme Court of Georgia did not accept this view and rather found from the evidence that Petitioner's conduct was calculated to force the Respondent to either hire union labor on its Atlanta job or in the alternative to be unable to comply with the terms of its contract with the City of Atlanta. If the Supreme Court of Georgia was correct in drawing an inference from the facts, as shown in the record, that the picketing in question was to coerce the Respondent in violation of the declared public policy of the State of Georgia, then it is humbly submitted that the doctrine expressed in the *Vogt* and *Graham* cases must prevail. Thus, it becomes of paramount importance to examine the finding of facts made by the Supreme Court of Georgia in order to determine whether or not its conclusion was justified.

Before dealing with the evidence considered by the Supreme Court of Georgia the Respondent would like

to point out to the Court that all the cases cited by the Petitioner, in support of its contention of preemption, may be distinguished because the concerted activity in each case was of its very nature within either Section 7 or 8 of the Act.

In this regard an examination of *Weber vs. Anheuser-Busch, Inc.*, 348 U.S. 468, shows on its very face that the picketing in question was to compel the employer to insert a certain clause into a contemplated collective bargaining contract, which conduct was obviously covered by the Act. In the case of *Building Trades Council vs. Garmon*, 359 U. S. 236, the facts showed that the union picketed the employer in an attempt to obtain a written agreement containing a union security agreement and, most importantly, the facts show that the effort was directed towards employees of the company picketed; an activity which is likewise obviously protected under the Act. In the case of *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, it actually appears there was a labor controversy in progress between the employees and the employer who was picketed; and this is also a situation which is very closely covered by the Act. In *Garner vs. Teamsters*, 346 U. S. 485, while the picketing was for the purpose of inducing employees to join the union the record clearly discloses that an interstate trucking company was involved and, perhaps most importantly, there was a finding by the Supreme Court of Pennsylvania that the conduct of the union fell within the jurisdiction of the National Labor Relations Board. In *Hotel Employees Union Local 255 vs. Sax Enterprises*, 358 U. S. 270, it was stipulated in the

record that interstate commerce was involved and accordingly the issues raised were covered by the Act.

It is submitted that there is nothing contained in the instant case which would substantiate Petitioner's contention that its conduct was protected or prohibited by the Act and the Supreme Court of Georgia has made no finding nor does the record reveal any evidence, which would justify a conclusion other than that reached by that Court. It becomes manifestly clear that whether or not the *Graham* and *Vogt* theory will be applied in the instant case depends entirely upon whether or not the conduct of the Petitioner, or at least its primary purpose, was to attempt to force Respondent into a situation which would be repugnant to the right to work statutes of the State of Georgia. Accordingly, it is essential that we turn to an examination of the record in order to determine whether the Supreme Court of Georgia was authorized in drawing the inference that the conduct of Petitioner was unlawful and contrary to the laws of that state.

The Supreme Court of Georgia Did Not Err in Holding that the Conduct of the Petitioner in Certiorari in Placing a Picket in Front of the Construction Job of the Respondent was Unlawful Conduct Under the Statutes of the State of Georgia.

The Supreme Court of Georgia in its decision, contrary to the contentions of Petitioner, did not find that the language upon the picket sign was true or that

the wages being paid by Respondent were not conforming with wages of a similar type of work in the Atlanta area or that the Respondent had breached its contract with the City of Atlanta. Rather, what the Supreme Court of Georgia did say was that the Petitioner had introduced evidence at the interlocutory hearing intending to show that the Respondent was not paying its employees the wage scale of *specified construction contractors* in the Atlanta area (Emphasis supplied) (Tr. 43); and that the trial judge *was authorized to find from the evidence* that the Respondent was not paying wages conforming with those paid for similar type work in the Atlanta area. (Emphasis supplied) (Tr. 43). No where in the decision of the Supreme Court of Georgia is there a finding that in fact there had been a violation of the contract with the City of Atlanta by the Respondent.

These distinctions are made to demonstrate that contrary to the contentions of Petitioner, we are not dealing with the right to peacefully exercise the right of communication in regard to economic conditions. It is submitted that while the Petitioner would have this Court believe its conduct was calculated only to disseminate information regarding an alleged breach of contract between the Respondent and the City of Atlanta, the record of this case clearly discloses otherwise. The Petitioner contends that its activity was protected under Section 8 of the Act because there was concerted activity for mutual aid or protection within the meaning of this section; and for this reason the Petitioner's contentions in regard to the breach of

contract by Respondent and the truthfulness of the statements on its picket sign become important. However, the Supreme Court of Georgia found notwithstanding the statements contained on the picket sign, that the undisputed evidence demonstrated clearly that the establishment of the picket line by the Petitioner in Certiorari was a signal to all members of labor unions to refuse to work on that particular job, or to furnish supplies for it and that this fact was well known to the Petitioner. The Court also found that the Respondent had no labor dispute with its employees and that the Petitioner was not representing employees of the Respondent. The Court further found that the Petitioner had chosen to use a method of importing information to the public which it knew would have the effect of paralyzing the Respondent's operations, preventing them from completing their contract within the time limit provided by its terms and forcing them to discharge a number of their employees. The Court then having found these facts from the evidence as presented in the Bill of Exceptions concluded that the facts of this case were similar to those of the case of *Powers vs. Courson*, 213 Ga. 20 (1), 96 S. E. 2d. 577, and that the evidence demanded a finding that the picket was placed on the job for the purpose of forcing the Respondent to employ only union labor or to be unable to comply with the terms of its contract because of the refusal of other unions employed in the work to cross the picket line and thereby slow the project to a virtual standstill; and as it held in the *Powers* case such picketing was for an unlawful purpose under the

statutes of the State of Georgia and was clearly a violation of the provisions of the Annotated Code of Georgia, §54-804 and §66-906.

As a general proposition, this Court has of course always followed the decisions of the highest court of a particular state as they relate to the construction of laws of that state unless there is some conflict with or impairment of a principle of the federal constitution or a federal statute. *Standard Oil Company vs. New Jersey*, 341 U. S. 428, 95 L. Ed. 1078, 71 S. Ct. 822, and numerous decisions cited therein. Of course, it is equally well established that this Court is justified in searching the record of a given case to determine whether the crucial findings by a state court had a reasonable basis in the evidence. *Local Union No. 10-AFL vs. Graham, supra*, and *Milkwagon Drivers Union vs. Meadowmoor Dairies*, 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552.

Justice Frankfurter, speaking for the Court, in the *Meadowmoor Dairies* case, *supra*, pointed out on Page 294 that the decision in regard to the Court's evaluation of testimony taken initially before a master and then authenticated by the Supreme Court of Illinois:

> "It is not for us to make an independent evaluation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking to her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a possible invasion of the constitutional guar-

anty here invoked. *The place to resolve conflicts in the testimony and its interpretation was in the Illinois court and not here.* (Emphasis supplied.) To substitute our judgment for that of the state court is to transcend the limits of our authority. . . . ."

Thus, as Justice Burton announced in the *Graham* case, this Court must limit its review of the merits of this case to a searching of the record to determine whether the findings by the Supreme Court of Georgia had a reasonable basis on the evidence presented under the Bill of Exceptions by the Respondent. It is respectfully submitted that the decision of the Supreme Court was not only sound and a correct interpretation of the statutes of that state but was well supported by the findings of fact enumerated above and contained in the record before the Supreme Court of Georgia.

In searching the record of this case to determine whether the Supreme Court of Georgia's findings had a reasonable basis, the Court's attention is directed first to uncontradicted portions of the evidence which substantiates the conclusion made by the Supreme Court of Georgia that the conduct of the Petitioner was for a purpose unlawful and in violation of the right to work statutes of that state. The affidavits of S. J. Curry and B. L. Humphries, Jr. (Tr. Exhibits A and B, pages 7-15) taken together establish as an uncontradicted fact that the Respondent had no labor dispute with any of its employees at the time Petitioner

placed its pickets on the construction site, nor did the Respondent have any sort of labor dispute or legal relationship with the Petitioner. These affidavits also establish as an uncontradicted fact that the presence of the picket placed on the construction job of the Respondent immediately resulted in unemployment and loss of work by certain of Respondent's employees as well as the refusal to deliver supplies and material to the job on the part of truck drivers and other carriers. These affidavits also show that the resulting work stoppage or cessation caused by the picket had effectively resulted in an interference with the Respondent's right to carry out its contract with the City of Atlanta. However, the most important fact established by these affidavits, which is uncontradicted, is that a demand was made to hire union workers on the particular job and after the refusal to do so, the union, through its representatives, stated that every means at the union's disposal would be used to see that union workmen were in fact used on the job. It should also be noted that there was no evidence introduced by the Petitioner at the interlocutory hearing in Fulton Superior Court to contradict the statements of Curry and Humphries except some general statement that the right to work statutes of the State of Georgia had not been violated, which of course was a mere conclusion on the part of the affiant. (Tr. Exhibit F, page 25.)

Certainly the strong uncontradicted statements contained in the affidavits of S. J. Curry and B. L. Humphries, Jr. in regard to demands for using union

labor that were made at the conference on the job site of February 14, 1961 substantiate the conclusion of the Supreme Court of Georgia that the actual purpose of the picket was to force Respondent to employ only union labor on its job or in the alternative to be unable to comply with the terms of its contract with the City of Atlanta because of the refusal of members of other unions employed on the construction job to cross the picket line.

The conduct of the Petitioner in the instant case is hardly consistent with its claim that it was only interested in placing the picket on its job for informational purposes. The conduct of the Petitioner prior to placing the picket on the job, that is, in arranging a conference at the job site with some eighteen business representatives present, coupled with the time lapse between the beginning of this job by the Respondent in December of 1960 and the placing of the picket on the job in August of 1961, is certainly inconsistent with any claim that the only interest of the Petitioner was public information or dissemination. Based on the evidence in the record as it is presently before this Court, can this Petitioner deny in good faith that the sole purpose of its picketing was not to hurt the Respondent, by publicity, and by annoyance of its presence and by preventing other needed employees from working on the construction site in question? Can it state in good faith that its only intentions were to get plaintiff to raise the wage standard on this particular job when in fact it knew and was charged with the

knowledge that its picket would bring about the condition complained of? In view of the demands made at the construction site at the initial conference, we think not, and we think that the conduct of the Petitioner is clearly indicative of the fact that its real intent and purpose was to bring such economic pressure to bear upon Respondent that it would be required to hire only union labor on this particular job.

As Justice Burton said in the *Graham* case, 345 U. S. 192, at page 201:

> "Based upon the findings of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on for the general contractor to eliminate from further participation all non-union men or all subcontractors employing non-union men on the project."

It is respectfully submitted that the Supreme Court of Georgia's judgment was well supported by the evidence in the record; and that the circumstances set forth in the opinion of that Court afford a rational basis for the inference it drew concerning the purpose of the picketing by the Petitioner. In this connection the Court's attention is invited to *Ellis, et al. vs. Parks*, 212 Ga. 540, 93 S. E. 2d 708; *Woodward, et al. vs. Collier, et al.*, 212 Ga. 239, 78 S. E. 2d 526, and *Powers vs. Courson, et al.*, 213 Ga. 20, 96 S. E. 2d 577.

CONCLUSION.

It is respectfully submitted that the Writ of Certiorari previously granted by this Court should be dismissed as improvidently granted for the reason that there is no final order or judgment for review by this Court. However, should this Court decide to consider the case on the merits it is respectfully submitted that the Supreme Court of Georgia has committed no error in the application of the right to work statutes of the State to the facts in the instant case nor has the Supreme Court of Georgia abridged any rights protected or outlined under the National Labor Relations Act.

Respectfully submitted.

By .....
H. H. PERRY, JR.
and

By .....
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CERTIFICATE

I do hereby certify that I have this day served the Petitioners in the within case with copies of the foregoing brief of Respondent, by mailing a copy of the same to Mr. Edwin Pearce and Mr. John Patton, 1642 Bank of Georgia Building, Atlanta 3, Georgia, they being attorneys of record for Petitioners.

All of this on the .....day of September, 1962.

ROBERT B. LANGSTAFF